POWER ROOT (M) SDN BHD & ORS A

v.

KETUA PENGARAH KASTAM

HIGH COURT MALAYA, KUALA LUMPUR B
AZIAH ALI J
[ORIGINATING SUMMONS NO: R1-25-288-2009]
6 DECEMBER 2010

REVENUE LAW: *Sales tax - Assessment - 'Other non-alcoholic beverages' subject to 10% sales tax - 'Extracts or concentrates of coffee' subject to 5% sales tax - Specific description for products - Respondent's classified products under 'beverages' - Whether respondent erred in decision - Whether tribunal had given reasonable consideration before dismissing appellants' application against respondent's decision - Consumer's view of products - Chemist's report - Tribunal acknowledged products were not thirst quenchers - Whether tribunal erred in law and in fact - Whether there was sufficient evidence for products to be classified as 'extracts or concentrates of coffee' under First Schedule to the Custom Duties Order 2007 [P.U.(A) 441/2007], Heading no. 2101.12.900* C D E

EVIDENCE: *Expert evidence - Chemist's report - Analysis of products - Addition of water and carbon dioxide - Chemist analysed products and determined physical properties - Whether tribunal should consider chemist's report - Whether tribunal's finding supported by chemist's report* F

This was an appeal by the appellants against the decision of the Customs Appeal Tribunal ('the tribunal'). The tribunal dismissed the appeal against the respondent's decision that classified four of their premixed coffee products/drinks ('the products') as 'other non-alcoholic beverages' under the heading no. 2202.90.900 G ('heading 2202') of the First Schedule to the Custom Duties Order 2007 [P.U.(A) 441/2007] ('the Order') which attracted 10% sales tax. The appellants contended that the products should have been classified as 'extracts or concentrates of coffee' under heading no. 2101.12.900 ('heading 2101') and, thus, were subject H to 5% sales tax. The appellants submitted that the respondent had erred in classifying the products under heading 2202 because they were not beverages but were consumed for health benefits due to the herbs found in them. The tribunal had acknowledged that the products were not intended as thirst quenchers. I

A Nevertheless, they found that the appellants had failed to prove on a balance of probabilities that the products should have been classified under heading 2101.

Held (allowing the appeal with no order as to costs):

B **(1)** The tribunal described the products as 'tonic beverages' because the products contained herbs. The tribunal found that in the consumer's expectation, these products *ie*, coffee drinks enhanced with herbs were 'tonics' that were not generally consumed as thirst quenchers but consumed for nutritional and C health benefits. Beverages were generally consumed for refreshment and to quench thirst. Having found that the products were 'tonics' not generally consumed as thirst quenchers, the tribunal should have arrived at a reasonable conclusion that these products were not 'beverages'. (para 19) D

(2) The tribunal found that the products contained at least 78% of water. Without the addition of sugar and milk powder, the products would not be palatable and pleasant to consume. Water was added as a soluble agent since the drinks were E sold in liquid form in cans. The tribunal acknowledged that the amount of moisture content was not the only criteria needed in deciding whether or not liquid was a beverage. The tribunal in its finding made no reference to or any finding on the chemist's reports regarding the products. The reason for F sending the products to the chemistry department to be analysed was to obtain information or confirmation on the physical properties of the products. The results of the analysis on the products' physical properties should have been considered. The tribunal's finding that the addition of water G and carbon dioxide had changed the physical properties of the products by dilution resulting in beverages, was not supported by the chemist's reports. (paras 20 & 22)

(3) The tribunal had failed to consider para. 4 r. 3(a) of the H Order that where goods are *prima facie* classifiable under two or more headings, the heading that provides the most specific description should be preferred. The tribunal had failed to consider whether the appellants' products fell under the description of heading 2101. The 'preparation with a basis of I coffee' under heading 2101 was more specific in describing the appellants' products instead of 'other non-alcoholic beverages'. (para 23)

(4) Paragraph 4 r. 3(b) of the Order provides that mixtures, composite goods consisting of different materials shall be classified as if they consisted of the material or component which gives them their essential character. In the present case, the materials in the products were coffee, water, sugar, milk and traditional herbs. To the consumer, the essential character of the products was that, it was a coffee drink with traditional herbs whether purchased in powder form or in the ready-to-drink liquid form sold in cans. The tribunal had not considered para. 4 r. 3(b) of the Order. (para 24)

(5) Having regard to the aforesaid, there was more than sufficient evidence to show on a balance of probabilities that the products should have been classified under heading 2101. (para 25)

Case(s) referred to:
Maxcell Bioscience, Inc v. United States [2007] Ct Intl Trade LEXIS 182 ***(refd)***
Re Ceres Natural Foods Pty Ltd v. Collector of Customs 10 ALN N81 ***(refd)***
Re Forever Living Products Australia Pty Ltd v. Collector of Customs 9 ALD 271 ***(refd)***

Legislation referred to:
Customs Duties Order 2007, para 4 rr. 1, 3(a), (b)
Evidence Act 1950, s. 114(g)

For the appellant - Cindy Goh; M/s Cheang & Ariff
For the respondent - Azamuddin Abdul Aziz SFC

Reported by Melanie Murthy

JUDGMENT

Aziah Ali J:

[1] The appellants appealed against the decision of the Customs Appeal Tribunal dated 12 August 2009 (exh. A6) which dismissed the appellants' appeal against the decision of the respondent dated 26 November 2008 classifying the following products/drinks manufactured by the appellants (tendered before the Tribunal as exh. P1, P6, P7 and P10) as 'other non-alcoholic beverages' under the tariff code 2202.90.900 of the First Schedule to the Customs

Duties Order 2007 [P.U.(A) 441/2007] ("the 2007 Order") which attracts sales tax of 10% under para. 2 of the Sales (Rates of Tax No. 1) Order 2008 ("the 2008 Order"):

(a) Alicafe Premium Gold with Oligofructose (exh. P1);

(b) Alicafe with Tongkat Ali (exh. P6);

(c) Per'l Café Kacip Fatimah (exh. P7), and

(d) Alicafe with Ginseng (exh. P10).

The appellants withdrew the appeal in respect of the other products.

[2] The appellants contend that the abovementioned products ought to have been classified as 'extracts or concentrates of coffee' under Heading No. 2101.12.900 and subject to 5% sales tax. The Tribunal found that the appellants have failed to prove on a balance of probabilities the products tendered as exhs. P1, P6, P7 and P10 should be classified under Heading 2101.12.900. Having heard the submissions and considered the evidence I allowed the appeal with no order as to costs.

[3] The products were sold in cans of 250 ml capacity. The Tribunal noted that on the cans are found the following descriptions:

(a) exh. P1 "premix coffee drink with oligofructose";

(b) exh. P6 "premix coffee drink with tongkat ali";

(c) exh. P7 "premix coffee drink with kacip fatimah", and

(d) exh. P10 "premix coffee drink with ginseng".

[4] The Tribunal found as follows:

(a) the drinks do not contain any alcohol and contain water of at least 78%;

(b) exhibits P1, P6, P7 and P10 had coffee powder;

(c) the quantity of coffee in exhs. P1, P6, P7 and P10 ranges from 3% to 4.5%;

(d) Alicafe Premium Gold with Oligofructose (exh. P1) contains coffee powder and oligofructose;

(e) Alicafe with Tongkat Ali (exh. P6) contains coffee powder and tongkat ali extract;

(f) Per'l Café Kacip Fatimah (exh. P7) contains coffee powder and kacip fatimah extract;

(g) Alicafe with Ginseng (exh. P10) contains coffee powder and ginseng extract;

(h) the drinks were pleasant to consume;

(i) all the drinks contain sugar and milk powder is added to enhance the taste;

(j) ginseng, tongkat ali and kacip fatimah have effects on the body;

(k) the expectation of the consumer is that the drinks containing those herbs are tonics;

(l) the drinks are not intended as thirst quenchers;

(m) a normal person can consume more than one can at any one time;

(n) there is no indication that the drinks containing tongkat ali should be consumed by men only;

(o) there is no indication that the drinks containing kacip fatimah should be consumed by women only;

(p) there is no warning on the cans that the drinks containing tongkat ali, kacip fatimah or ginseng should not be consumed by children or pregnant women;

(q) the drinks are sold in high traffic areas such as at petrol stations and easily available to consumers travelling by road;

(r) the goods with the same ingredients but in powder form had been classified as 'extracts or concentrates of coffee' by the Respondent;

(s) the Explanatory Notes to the Heading 21.01 states in para. 1 that the extracts or concentrates of coffee may be in liquid or powder form, usually highly concentrated;

(t) the addition of water and carbon dioxide had changed the physical properties;

(u) the quantity of water added is substantial and the ingredients including the coffee were no longer in a concentrated form;

(v) the dilution of the ingredients changed the character of the drinks substantially resulting in beverages;

(w) the drinks containing ginseng, tongkat ali and kacip fatimah were tonic beverages.

[5] The appellants contend that the Tribunal has failed:

(i) to follow the proper principles of interpretation to the Schedules of the 2007 Order;

(ii) to take into account the rules of interpretation in particular para. 4 r. 1, 3(a) and (b) of the 2007 Order;

(iii) to take into account the Chapter Notes of the 2007 Order;

(iv) to take into account the reports from the Chemistry Department on the products;

(v) to take into consideration the research materials tendered by the appellants on the medicinal values of coffee, tongkat ali and ginseng;

(vi) to take into consideration the Process Chart on the Manufacture of the products produced by the appellants, and

(vii) to call the relevant expert witnesses or other material witnesses and hence adverse inference pursuant to s. 114(g) of the Evidence Act 1950 should be invoked against the respondent.

Therefore it is submitted that the Tribunal has erred in law and in fact.

Submissions

[6] The respondent had classified the products exhs. P1, P6, P7 and P8 under Chapter 22 Heading 22.02 Subheading 22.02.90.900 to the First Schedule of the 2007 Order which reads as follows:

Heading/ Subheading (1)			Description (2)
22.02			Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured, and other non-alcoholic beverages, not including fruit or vegetables juices of heading 20.09.
22.02	.10 000	–	Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavoured
22.02	.90	–	Other:
	100		Non-aerated beverages ready for consumption without dilution
	900		Other

[7] Counsel for the appellants submits that the respondent has erred in classifying the products under Heading 2202.90.900 because the products are not beverages. It is submitted that the appellant's products are consumed for health benefits from the herbs. Case law shows that 'beverages' are consumed to quench thirst but the appellant's products are consumed not as thirst quenchers. In support counsel cites the case of *Re Ceres Natural Foods Pty Ltd v. Collector of Customs* 10 ALN N81 where it was held that soya milk, a product containing soybeans in water and corn oil, barley malt, salt and flavourings though highly nutritious, but its nature would generally mean that people would not drink it for refreshment. The tribunal found that they were properly classifiable under Chapter 21 item 21.07.4. In the present case it is submitted that the Tribunal has acknowledged that the products are not intended as thirst quenchers.

[8] It is submitted that the respondent ought to have been classified the products under Chapter 21 Heading No. 2101.12.900 being 'preparation with a basis of coffee' as it is not disputed that the drinks contain coffee as the main ingredient. Chapter 21 reads as follows:

Heading/ Subheading (1)		Description (2)
21.01		Extracts, essences and concentrates, of coffee, tea or mate and preparations with a basis of these products or with a basis of coffee, tea or mate; roasted chicory and other roasted coffee substitutes, and extracts, essences and concentrates thereof
		– Extracts, essences and concentrates, of coffee, and preparations with a basis of these extracts, essences or concentrates or with a basis of coffee:
2110	.11 000	– – Extracts, essences and concentrates
2101	.12	– – **Preparation with a basis of extracts, essences or concentrates or with a basis of coffee**
	100	"Coffee pastes" consisting of mixtures of ground roasted coffee with vegetable fats and sometimes other ingredients
	900	Other

The Chapter Note 1(b) to Chapter 21 states that the Chapter does not cover amongst others 'Roasted coffee substitutes containing coffee in any proportion' but Chapter Note 2 states that 'Extracts of the substitutes referred to in Note 1(b) are to be classified in heading 21.01'. Therefore it is submitted that 'coffee drink' which is a 'preparation with a basis of coffee' falls under the Heading 2101.12.900. Counsel for the appellants submits that para. 4 of the 2007 Order states that "... for legal purposes, classification shall be determined according to the terms of the headings and any relative Section of Chapter Notes ...". The same statement appears in the General Rules for the Interpretation of the Harmonised System which governs classification of goods. It is submitted that the Tribunal erred in not taking into consideration the Chapter Notes in coming to its decision.

[9] Counsel further submits that Chapter Note 1(c) to Chapter 21 expressly excludes 'flavoured tea', a drink in liquid form but there is no mention of exclusion of other types of drinks including coffee drinks. Therefore it is submitted that the 'preparation' under this Heading is not confined to products in solid form as contended by the respondent but also include 'preparation in liquid form'.

[10] The Tribunal had referred to the *Concise Oxford Dictionary*, 11th edn on the meaning of the word 'beverage' as 'a drink other than water'. Counsel for the appellant submits that the Tribunal has adopted a too literal interpretation of the word 'beverage'. Counsel submits that the meaning of the word 'beverage' must be construed in its proper context. In support counsel cites the case of *Re Forever Living Products Australia Pty Ltd v. Collector of Customs* 9 ALD 271 where the court held that the meaning of a word or phrase is to be derived from its context. In that case the issue was whether aloe vera juice and gel falls under item 13.03 (vegetable saps and extracts), 20.07 (fruit juices and vegetables), 22.02 (beverages) or 30.03 (medicaments). The respondent contended that the drinks ought to be classified under item 22.02 'Lemonade, flavoured spa waters and flavoured aerated waters, and other non-alcoholic beverages'. The respondent referred to the definition of 'beverage' in the *Concise Oxford Dictionary* as 'liquid for drinking'. The tribunal found that this was too literal an interpretation as follows:

> The meaning of a word or phrase is to be derived from its context. This is akin to the *ejusdem generis* rule. Here the genus or family of objects consists of drinks which (however difficult to define in exact terms) are generally considered to be pleasant and are generally drunk for refreshment. Aloe vera juice is in no way akin to lemonade or any of the other nominated drinks. They (like the goods in Chapter 20) are usually to be found on household tables.
>
> The subject goods are not generally considered pleasant and are not generally drunk for refreshment. The fact that they have a small dosage indicated on the packaging indicates that the seller of the substances does not expect them to be consumed for refreshment ... The evidence does not support the submission that the goods should be classified as a beverage as that word is used in item 22.02 of the Tariff.

The tribunal found that the evidence does not support the submission that the goods should be classified as 'beverage'. The tribunal concluded that it was justifiable for the drinks to be classified under item 30.03 (medicaments)

[11] Counsel for the appellants further cites the case of *Maxcell Bioscience, Inc v. United States* [2007] Ct. Intl. Trade LEXIS 182 where the plaintiff is an importer of two liquid dietary supplements. The government classified the products as 'food preparations' rather than 'non-alcoholic beverages'. The plaintiff contended that the products were beverages because they were drinkable in their imported condition. The court disagreed because the products were not intended for consumption in significant and non-measured quantities like beverages. The plaintiff's two products recommended a measured, one-to-two ounce dose taken three times a day before meals. Further most beverages are consumed for refreshment and to quench a thirst. The plaintiff's products were not designed to be flavourful and refreshing or to quench thirst. One product had a bitter, medicinal taste and the other had an oily appearance and consistency. No one would buy or consume either product other than strictly for health or nutritional purposes. Therefore it was held that the plaintiff's products could not be classified as beverages.

[12] Counsel for the appellants submits in the present case the products are not meant to be consumed in substantial amounts to quench thirst like beverages. The products are consumed because of the coffee content and the traditional herb content and not because of the water content in the coffee to quench thirst. The drinks are designed to be taken for its medicinal values and health benefits. The addition of sugar or milk does not change the fact that the products are not consumed as thirst quenchers but for the health and nutritional purposes of coffee, tongkat ali, kacip fatimah and oligofructose. Counsel submits that the Tribunal had failed to consider the research materials tendered by the appellants to consider whether the products are consumed for their medicinal values or to quench thirst.

[13] Counsel submits that the important criteria is whether the product is a thirst quencher and in support counsel cites the case of *Re Ceres Natural Foods Pty Ltd v. Controller of Customs (supra)* where the tribunal classified soya milk under Chapter 21 as by its

nature the tribunal found that people would not generally drink it for refreshment. Counsel refers to the evidence of AW1 who confirmed that the traditional herbs found in the products have a bitter taste and sugar was added to reduce the bitter taste. The Tribunal had in fact acknowledged the health benefits of the traditional herbs and acknowledged that the products were not intended to be thirst quenchers. Hence it is submitted that although the products are pleasant to consume, the taste of the products is not the only criteria in deciding whether the products are 'beverages'. Therefore it is submitted that the products could not have been classified as 'beverages' in the ordinary sense.

[14] Counsel further submits that under the rules of interpretation of the Schedules, para. 4 r. 3(a) provides that where goods are *prima facie* classifiable under two or more headings, the heading that provides the most specific description shall be preferred. It is submitted that the description 'preparation with a basis of coffee' is more specific than 'non-alcoholic beverages' as contended by the respondent. Therefore in accordance with para. 4 r. 3(a) the respondent is required to adopt the more specific classification which covers 'coffee drinks' rather than 'beverages' which covers 'drinks in general'.

[15] Further counsel submits that para. 4 r. 3(b) of the 2007 Order provides that mixtures, composite goods consisting of different materials shall be classified as if they consisted of the material or component which gives them their essential character. In the present case the materials are coffee, water, sugar but the essential character of the products is coffee with traditional herbs although water and sugar had been added. The same products in powder form and packed in sachets had been classified under Heading 2101.12.900. Thus it is submitted that the same classification should be used for the products in liquid form as the presence of water merely turns the products from powder form to liquid form but the function of the products do not change. Water is added as a soluble agent. The addition of sugar and milk is to make the products more drinkable. However the essential character of the products does not change.

[16] The Tribunal found that the appellant's products contain at least 78% water. According to the Tribunal the addition of water and carbon dioxide had changed the physical properties of the

products and the ingredients including the coffee were no longer in concentrated form. The Tribunal found that the dilution of the ingredients changed their character substantially resulting in beverages. Counsel submits that the Tribunal erred in holding that the quantity of coffee in the product is small compared to water despite acknowledging that the amount of moisture content was not the only criteria in deciding whether or not a liquid was a beverage. Counsel submits that the essential character of the product is not gauged by the quantity of each ingredient. Further it is submitted that the changing of the properties of a product is a technical matter which requires the testimony of expert witness. The respondent has not called such witness to testify. Counsel submits that the Tribunal has failed to consider the report of the analysis on the properties of the products issued by the Chemistry Department on exhs. P6 and P7 and the view of the chemist that the products may be classified under Heading 2101.12.900. It is submitted that the Tribunal ought not to have accepted that the physical properties of the product has changed merely based on the respondent's submissions.

[17] As comparison counsel refers to the chemist report on two brands of chicken essence. Brand's Essence of Chicken consists of 92.3% water and Eu Yan Sang consists of 91.9% water. Despite the large water content, the respondent did not classify them as 'beverages' but classified them under Heading No. 2202.90.900. Counsel further cites the examples of the coffee drinks 'espresso' which is more concentrated than a 'latte' which has more water or milk added. Yet the 'latte' is still considered a coffee drink because of its essential character. Similarly it is submitted that in respect of the products in the present case, sugar and non-diary creamer are added to the coffee powder and the powdered herbs to make the products more drinkable and water is added as a soluble agent. The essential character of the products is 'coffee with traditional herbs' and by virtue of para. 4 r. 3(b) the products should be classified according to their essential character ie, 'preparation with a basis of coffee' under Chapter 21.

[18] For the respondent learned Senior Federal Counsel submits that the Tribunal has considered the definition of 'beverage' as 'a drink other than water' and has applied para. 4 r. 1 of the Rules of Interpretation to ascertain which Heading the products fall

under. It is submitted that based on the Harmonised System by the World Customs Organisation, the classification of a product must follow the flow of the products. Thus coffee beans in its natural form is classified under Chapter 09, if processed and turned into concentrated form will be classified under Chapter 21, and if water is added it will be classified under Chapter 22. Similarly if water is added to tongkat ali it will be classified under Chapter 22. It is submitted that the Tribunal has taken into consideration the chemist report, the research materials on the medicinal values of the herbs tendered by the appellants, the process chart in the manufacture of the products and the evidence of the appellants' witnesses. It is submitted that the quantity of water added to the ingredients resulted in the ingredients including the coffee no longer to be in a concentrated form and the dilution of the ingredients substantially resulted in 'beverages'. It is submitted that the quantity of water added to a concentrated fruit juice necessary to reconstitute the original fruit juice resulted in a diluted product that changed its character to a beverage. With regard to the chemist report it is submitted that the chemist's view on the classification ought not to be considered because the expert on classification and tariff code is the respondent's witness who has 20 years' experience and well versed with the 2007 Order.

Decision

[19] The Tribunal describes the products as 'tonic beverages' because the products contain the herbs ginseng, tongkat ali and kacip fatimah. The Tribunal found that the expectation of the consumer is that the drinks containing the herbs are 'tonics' and not intended as thirst quenchers though a normal person can consume more than one can at any one time. The finding of the Tribunal shows that the Tribunal accepted that the expectation of the consumer is that these products, coffee drinks enhanced with herbs, are 'tonics' not generally consumed as thirst quenchers but consumed for nutritional and health benefits. Hence the products are sold at high traffic areas like petrol stations so that they are easily available to consumers who travel by road. They are also easily consumed being sold in cans. Beverages are generally consumed for refreshment and to quench thirst *(Re Forever Living Products Australia Pty Ltd v. Collector of Customs, supra; Re Ceres Natural Foods Pty Ltd v. Controller of Customs, supra)*. I am of the view that having found that the products are 'tonics' not generally

consumed as thirst quenchers, the Tribunal ought to have arrived at the reasonable conclusion that these products are not 'beverages'.

[20] The Tribunal found that all the products contain 3% to 4.5% coffee and at least 78% water. The appellants' witness AW1 confirmed that the traditional herbs found in the products have a bitter taste and sugar is added to reduce the bitter taste and milk powder is added to enhance the taste. Thus without the addition of sugar and milk powder the products would not be palatable and pleasant to consume. Water is added as a soluble agent since the drinks were sold in liquid form in cans.

[21] The Tribunal acknowledged that the amount of moisture content is not the only criteria in deciding whether or not liquid is a 'beverage'. The chemist report on Brands Essence of Chicken and Eu Yang Sang's Essence of Chicken referred to by the Tribunal shows that Brands Essence of Chicken contains 92.3% water and Eu Yang Sang's Essence of Chicken contains 91.9% water. Yet the respondent did not classify both products as 'beverages'.

[22] The chemist reports in respect of exhs. P6 and P7 were tendered. In respect of P6 the analysis by the chemist shows that the product contains 85.1% water, coffee extract, plant extract, glucose, maltose and preservatives. In respect of P7 the product contains 86.3% water, coffee extract, sucrose, maltose and preservatives. Thus the chemist's reports show that these two essence of chicken products contain a much higher moisture content than the appellant's products. The Tribunal in its findings made no reference to or any finding on the chemist's reports for the products. The learned Senior Federal Counsel submits that the chemist's view on the classification of the products ought not to be considered since the expert on classification is the respondent. In my opinion the reason for sending the products to the Chemistry Department to be analysed is to obtain information or confirmation on the physical properties of the products. The chemist analysed the products and determined the physical properties. Even if the opinion of the chemist on the classification of the products ought not to be considered, the results of the analysis on the products' physical properties ought to have been considered. I am of the view that the Tribunal ought to have considered the chemist reports on the physical properties of the

products. I find that the finding of the Tribunal that the addition of water and carbon dioxide had changed the physical properties of the products by dilution resulting in beverages is not supported by the chemist's reports.

[23] I agree with the appellants that the Tribunal had failed to consider para. 4 r. 3(a) that where goods are *prima facie* classifiable under two or more headings, the heading that provides the most specific description shall be preferred. The Tribunal appears to have failed to consider whether the description under Heading 21.01 which is "Extracts, essences and concentrates, of coffee, and preparations with a basis of these extracts, essences or concentrates or with a basis of coffee:" and whether "preparations with a basis of coffee" under Heading 2101.12.900 aptly describes the appellants' products. I agree with the appellants that 'preparation with a basis of coffee' under the Heading 2101.12.900 is the more specific description to describe the appellants' products than 'non-alcoholic beverages'.

[24] Paragraph 4 r. 3(b) of the 2007 Order provides that mixtures, composite goods consisting of different materials shall be classified as if they consisted of the material or component which gives them their essential character. In the present case the materials in the products are coffee, water, sugar, milk and traditional herbs. A consumer's general expectation of the products is that it is a coffee drink containing health and nutritional benefits from the addition of herbs. Thus to the consumer the essential character of the products is that it is a coffee drink with traditional herbs whether purchased in powder form or in the ready-to-drink liquid form sold in cans. I find that the tribunal has not considered para. 4 r. 3(b) of the 2007 Order.

[25] I find that there is more than sufficient evidence to show on a balance of probabilities that the products exhs. P1, P6, P7 and P10 ought to have been classified under Heading 2101.12.900. For the reasons stated above I agree with the appellants and I allowed the appeal but with no order as to costs.